IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

C.E.A. No.154 of 2005
Date of decision: 13.12. 2006

Modi Sales (Furnace Division), Ludhiana.

-----Appellant.

Vs.

The Commissioner of Central Excise, Chandigarh and another.

-----Respondents.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE RAJESH BINDAL

Present: Mr. Akshay Bhan, Advocate
for the appellant.

Mr. M.S. Guglani, Advocate
for the respondents.

ORDER:

This appeal has been preferred by the assessee against the order dated 23.09.2003 of Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short, (the Tribunal") in Appeal No.E/818/2003-NB(S), proposing following substantial questions of law:-

"(i) Whether in the facts and circumstances of the present case, the order passed by ld. Tribunal (Annexure A-3) without going into the facts of the case, is legally sustainable in the eyes of law?

(ii) Whether in the facts and circumstances of the present case, the action of the authorities below in rejecting the abatement claim of the appellant, on its own presumption of non-closure of the unit, is legally sustainable in the eyes of law?"

The assessee applied for abatement of duty for the period (i) 17.1.1998 to 1.2.1998 (ii) 21.2.1998 to 14.3.1998 and (iii) 13.3.1998 to 1.4.1998.

The claim was disallowed inter-alia on the following ground:-

> "(iii)…… the unit was registered with the department as single unit having two furnaces of 3 MT and 3.5 MT capacity. The capacity of the unit was determined by this office vide C. No.IV(16) (CL/IF.104/T/97/19099-101 dated 18.2.98. As intimated by the party and also verified by the jurisdictional Asstt. Commissioner, the unit did not remain closed as a whole during the period in respect of which abatement claims have been filed. This is non compliance of the basic requirement of law on the basis of which abatement claim is admissible. ….."

The assessee filed a writ petition in this Court, which was dismissed vide order dated 19.08.2002 on the ground of availability of alternative remedy, but it was directed that if the appeal is filed within 30 days, the same will be decided on merits. The assessee filed the appeal, which was barred by limitation and the same was dismissed on that ground.

Learned counsel for the appellant submits that the matter ought to be remanded back to the Tribunal for a fresh decision by condoning the delay in filing the appeal before the Tribunal.

We are of the view that no useful purpose will be served as the issue is settled against the assessee by order dated 25.08.2006 in Customs Appeal No.3 of 2004, ***M/s R.K. Machine Tools Limited v. Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi & anr.,*** wherein the following the judgment of Hon'ble the Supreme Court in ***M/s Channy Enterprises v. Commissioner of Central Excise,*** AIR 2005 Supreme Court 2228, it was held that the compounded levy Scheme under Section 3A of Central Excise Act, 1944 did not operate on the basis of actual production but on the capacity of the induction furnace to produce. It was also held that plea for abatement of duty could not be accepted when only one of the furnaces had remained closed, as relief of abatement was permissible only when the entire factory was closed.

Learned counsel for the appellant is unable to show any distinction as the unit of the appellant was having one registration number and one induction furnace continued to function.

In view of above, we do not find any merit in this appeal and the same is dismissed.

(ADARSH KUMAR GOEL)
JUDGE

December 13, 2006 **(RAJESH BINDAL)**
ashwani **JUDGE**